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SUPREME COURT, U.S.

NO. 287

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

INTERSTATE OIL PIPE LINE COMPANY,
Appellant,

vs.

A. H. STONE, CHAIRMAN STATE TAX COMMISSION,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR APPELLEE

J. H. SUMRALL, Attorney for Appellee

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STATEMENT OF THE CASE

This is an appeal from the decision rendered by the Supreme Court of Mississippi on April 26, 1948, reported in 35 So. 2d at page 73.

The case involves the liability of a foreign corporation for the tax imposed upon the exercise of the privilege taxed by Section 2-d of Chapter 119 of the Laws of 1934, being Section 10109 of the Mississippi Code of 1942. The particular part of said section involved in this controversy being the provision for the imposition of the tax on every person engaging or continuing in this state in the business of operating a pipe line for transporting from one point to another in this state of oil or natural gas, or artificial gas, through pipes or conduits in this state.

The statute imposing the tax which was demanded by the Commissioner and paid by the appellant is as follows:

(Para. 7 of Chapter 1010 of the Mississippi Code of 1942).

> "Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting for compensation or hire from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business."

The tax demanded and collected by the appellee, as Commissioner, clothed with the authority and charged with the duty of administering the law in question, was on the basis of two per cent of the gross income of the business, the compensation being received only on the basis of the number of miles within the state that the oil was transported, the charge for such services being definitely fixed at so much per barrel of oil transported, according to the number of miles within the state that the oil was transported. The sole contention of the appellant in the original objection to the demand for said tax, first before the Tax Commission on the hearing granted, in the Circuit Court of Hinds County, in which the case was tried under the proceeding provided by statute, in the nature of a suit against the Commissioner for the recovery of the tax paid, and in the Supreme Court of Mississippi, was based on the provision in said section of the law:

> "There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from

business conducted in commerce between this State and other States of the United States, or between this State and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

In the Agreed Statement of Facts upon which this case was tried in the Circuit Court of Hinds County, Mississippi, the following language appears:

> "The amount of sales tax demanded by the Commissioner and paid by the Company, and which it is sought to recover by this suit, was computed only upon the amount of compensation received by the Company for transporting oil or petroleum products from the places of production in the State to the places in the State where deliveries were made to a railroad or other common carrier for transportation out of the State. And did not include any compensation received by the Company for transportation beyond the boundaries of the State."

It was on the basis of this Agreed Statement of Facts that the Court concluded that the activity of the appellant for which the compensation was received, being wholly within the State of Mississippi, and the further fact that the appellant had no contractual relation with any other transportation company for a continuous movenient of the commodity when first accepted by the appellant, does not constitute such a part of the interstate movement as to permit the exemption contained in the statute to apply to this activity. The sole contact of the appellant with the interstate carrier which ultimately moved the commodity out of the state being as agent for the shipper. The Bill of Lading obtained being in the name of the shipper and the owner of the oil as con-

signor, and naming the consignee outside of the state to whom the owner consigned the oil. The delivery to an interstate carrier being made through the agency of the appellant, who performed said service wholly through local activity. The Supreme Court of Mississippi held that the appellant was not engaged in interstate commerce. And it also held that for that reason the language of the statute by which an exemption was granted from the tax did not apply.

STATEMENT OF THE FACTS

The Interstate Oil Pipe Line Company, the appellant herein, when oil was first discovered in Mississippi, and the oil being discovered was not known to be of such quantity as to justify an interstate carrier to build spur tracks or pipe lines into the few small oil fields; but realizing the necessity for some facilities of transporting the oil from the remote scene of production to some interstate carrier to be transported out of the state, undertook to supply these facilities and receive the benefit of the compensation to be received for rendering the service of transporting the oil from the place of production to an interstate carrier which had the facilities for transporting the oil beyond the state line to refineries which were the ultimate purchasers or receivers of such oil.

All of the operations of the appellant which were regarded as subject to tax, and for which the only taxes were paid, and for which recovery was sought in this suit, were imposed upon the activities of the appellant in transporting oil from one place within the state to another place within the state.

As soon as appellant, after realizing that oil development within the state indicated a sufficient volume of oil in numbers of fields from which oil would be pro-

duced, then provided itself with the proper facilities for transporting oil in continuous movement from the place of production in the state to points outside the state without the intervention of separate and distinct interstate carriers to whom oil had been previously delivered, then no further demand was made on the appellant for Sales Tax in connection with its operations within the state, or facilities used within the state employed in transportation of oil from a point within the state to a point without the state. In otherwords, as soon as the appellant constructed trunk pipe lines from points within the state to points beyond the state and actually began the operation of interstate commerce, then no further demand was made on the appellant for taxes on account of such activities, and no such tax is involved in this suit.

ARGUMENT

The Supreme Court of Mississippi held that under the admitted facts that the movement of the oil transported by the appellant was clearly in preparation for its interstate transportation, and that the mere transfer of the property to the loading ramp or depot within the state from which the transportation or journey to interstate was to begin, was not a part of that transportation so as to exempt the appellant from State taxation on the ground that it would be an interference with, or burden upon interstate commerce.

In support of the holding of the Mississippi Court, it cited cases establishing the modern trend of the decisions of this Court in holding that even taxation of interstate commerce is not prohibited where it is shown that the result of the tax is not burdensome and does not attempt to regulate or control interstate commerce. The cases cited by the Supreme Court of Mississippi being Mc-

Goldrick v. Berwind-White Coal Mining Company, 309 U. S., 33, 60 S. Ct. 388, 84 L Ed. 565; Interstate Natural Gas Company v. Stone, 308 U. S. 522, 60 S. Ct., 292, 84 L. Ed., 442, and other cases.

There are many other cases cited by the Mississippi Court which bear on the opinion, which is part of the record in this case, and I shall not therefore burden the Court by enumerating said cases. But I respectfully call this Court's attention to the language used by this Court in the case of Memphis Natural Gas Company v. Stone, decided by this Court on June 21, 1948, reported in Advance Sheet Number 16, Volume 68 of the Supreme Court Reporter, at page 1475, the specific language referred to being:

> "As we are bound by the construction of the State statute by the State Court it is idle to suggest that the tax is on 'the privilege of engaging in interstate business'."

And further

> "This tax is not an unapportioned tax on gross receipts from the commerce itself . . . It cannot be duplicated in other states . . . If it was intended to say that such in-the-state activities as there described could not be taxed, we disagree with that conclusion."

And further

> "This is a tax on activities for which the State, not the United States, gives protection and the State is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

Other authorities relied upon by the appellee in support of its contention that the appellant was not engaged

in Interstate Commerce, are the Mississippi case of Chassaniol v. City of Greenwood, 166 Miss. 848, which was affirmed by the Supreme Court of the United States in 280 U. S., page 390; Jersey Central Power & Light Company v. Federal Power Commission, 319 U. S., 61; New York Ex Rel Pennsylvania Railroad Company v. Knight, 192 U. S. 21, 48 L. Ed. 325, 24 S. Ct. Reporter 202; and United States of America v. Yellow Cab Company, Et Al, 332 U. S. 218-234, 91 L. Ed. 2010.

By Section 2(d) of Chapter 119, Laws of 1934, as amended, the same being Section 10109 of the Code of 1942, it is provided:

> "Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this State, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business."

Said section of the law contains six other paragraphs, by the provisions of which the tax is imposed on persons engaging in the business of operating water or public sewerage systems, street railways for the transportation of freight or passengers for hire; upon persons supplying electricity, electric lights, current, power or gas, natural or artificial; and upon persons engaged in the business of operating telegraph lines or telephone lines for transmission of messages between points within the state; and upon persons operating railroads for the transportation of freight or passengers for hire between points within the state; and upon persons engaging in the business of operating an express business, transport-

ing freight or passengers from one point to another within the state. The concluding paragraph in said section providing:

> "There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from business conducted in commerce between this State and other States of the United States, or between this State and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

From the Agreed Statement of Facts submitted, paragraph XI, page 34 of the record, and the allegations of the declaration itself, it will be noted that the appellant was required to pay the tax because of the admitted activity on its part of transmitting oil in its pipe line for hire between the point of production in the state and other points within the state, and that its sole activity in connection with the transportation of the oil was wholly intrastate and none of the tax demanded or paid was received from any activity upon its part in transporting oil beyond the boundaries of the state.

The Sales Tax demanded and paid, and which it is sought to recover by this suit, was computed solely on the compensation received by the appellant for transporting oil for hire in its pipe line which did not extend beyond the boundaries of the state.

According to the contention of the Commissioner, charged with the duty of administering the laws involved, there is no other consideration except the admitted activity of the appellant, and the application of the laws involved to such activity. But notwithstanding the fact that the appellant's activities are confined exclusively

within the state, and the compensation received covered no other activity than that wholly within the state, the appellant is claiming immunity from the tax by reason of certain provisions of the law under which the taxes were demanded and paid, which according to the construction uniformly placed by the Commission on said law over a long period of time, had no application whatsoever to the activities of the appellant.

It will be noted that the law in question deals with Excise taxes alone. The Sales Tax being computed on the basis of two per cent of the amount received as compensation for the transportation of oil from one point within the state to another point within the state by pipe line.

When it is realized that Excise tax alone is under consideration, then to my mind, such other taxes as advalorem taxes or the rules governing the taxable property for advalorem purposes are foreign to and have no relation whatsoever to the question before the Court.

Many of the cases cited by the attorneys for the appellant in their brief filed with the Tax Commission, and which the Tax Commission had before it in concluding that the taxes paid were due and many of the cases cited in the brief in this Court have reference to the application only to the situs of property for advalorem taxation purposes. And such authorities were considered by the Commission, as well as this attorney for the appellee, as having no application whatsoever to the question of liability for Excise Taxes, which were based entirely upon the activity of the appellant and the compensation received by it in connection with property belonging to someone else. And that necessarily, since no liability for advalorem taxes existed against the appellant, that decisions with reference to the taxability of property to the

owner thereof for advalorem purposes had no application whatsoever to the question as to liability of the appellant for Excise taxes paid.

In the case of Federal Compress and Warehouse Company v. McLean, Sheriff, reported in 166 Miss., 739, involving the question of liability of the Compress Company for a privilege tax for the privilege of operating a compress, the Compress Company denied liability on the ground that it was a Delaware Corporation operating under the U. S. Warehouse Act, and that the cotton upon which it performed services was in preparation for shipment in interstate commerce. The agreed statement of facts, among other things, was to the effect that the Compress Company was the limited agent of the Railroad Company for the purpose of receiving the cotton from the Railroad Company and delivering the cotton to the Railroad Company, loading and unloading the cotton from and into the cars of the said Railroad; and as principal, to furnish the premises for the use of the Railroad Company as a cotton depot under and subject to all of the terms and conditions and lawfully published tariffs and regulations of the Railroad Company from time to time, with respect to the transportation in the handling of the cotton.

The facts further showed that the rates arranged by the Railroad Company for transporting the cotton that had been shipped to the compress from the interior point on a local bill of lading is the through rate from the point from which it was shipped to the compress company to the point of destination under the new bill of lading which the Railroad issued when the cotton was delivered to it by the compress company. And that the compress company's charges for compressing and handling the

cotton was paid by the Railroad Company, which charges, together with the railroad transportation charges, were approved by the Interstate Commerce Commission.

The court upon this state of facts, and upon the contention of the compress company that the cotton moving through the appellant's warehouse and compress entered into and became a part of Interstate Commerce, held that it became interstate commerce when, *but not until*, it commenced its journey from this state to another state or country; in other words, when the cotton was delivered to the Railroad Company for transportation into another state or country. The Court further held that this did not occur until the cotton was delivered to the Railroad after being handled and compressed for transportation. And that the assembling of the cotton in the warehouse and its compression were only acts preliminary, convenient for, but not absolutely essential, to its transportation to other states or countries.

The Supreme Court of Mississippi having held that the Compress Company was liable for the tax, notwithstanding that its activities were wholly in connection with the handling of cotton which was ultimately shipped beyond the boundaries of the state, the Compress Company appealed the case to the Supreme Court of the United States. And the decision of the United States Supreme Court thereon is to be found in 291 U. S. at page 17. The Supreme Court of the United States affirmed the decision of the lower court and held that the fact that the compress company's contract with the Interstate rail carrier designated the compress company as a carrier's agent, and the compress company's warehouse as a carrier depot, could not alter the legal consequences as to what is actually done with the cotton.

The Court held further that it is not within the power of the parties by descriptive terms of their contract to convert a local business into an interstate commerce business, protected under said commerce clause. And the Court further held that the compress company in the enjoyment of the privilege which it engaged in upon its own behalf, was not subject to government control since it was the conduct of a private business for profit. And the Court further held that the mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy.

The case which more nearly approaches the exact question before the Court, is the decision by the Supreme Court of the United States in the case of the Atlantic Coast Line Railroad Company v. Standard Oil Company, 275 U. S. 257. The language of the Court in its decision, which is directly applicable to the question before the Court in this case is as follows:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by the mere billing or terms of contract, although that could be one of a group of circumstances tending to show such character. The re-shipment of an interstate or foreign shipment does not necessarily establish a continued movement or prevent the shipment to a point within the same state from being an independent or intrastate character even though it is in the same car."

On the question of whether or not the imposition of the tax upon the local activity of the plaintiff would do violence to the right of the federal authorities or the Interstate Commerce Commission to regulate the rates to

be charged for services which might be proper in view of the nature of the service rendered by the plaintiff as a common carrier, the following language of the Supreme Court of the United States is applicable as contained in the case of Parker vs. Brown in 317 U. S., 341, the language of the Court being as follows:

> "State regulations affecting interstate commerce are to be sustained, not because they are 'indirect', rather than 'direct', not because they affect rather than command operations of interstate commerce, but because upon a consideration of all relevant facts and circumstances, the matter appears an appropriate one for local regulations, for which there may be wide scope without materially obstructing the free flow of commerce."

In the case of Chassaniol v. City of Greenwood, reported in 166 Miss., at page 848, the Court had before it the question of whether or not the imposition of the privilege tax upon each cotton broker who buys and sells cotton was improper because the activity of the buyer upon which the privilege tax was imposed was the purchase of the cotton to be shipped in interstate commerce.

The Court in the consideration of this question used the following pertinent language which is applicable to the case before this Court:

> "The essential character of commerce upon the accident of through bills of lading is its continuity of movement in foreign commerce, and that determines federal or state control over it and it takes character as interstate or foreign commerce *when it is actually started in the course of transportation to another state or to a foreign country.*" (Emphasis supplied).

The Court in its opinion referred to the case of Superior Oil Company v. Mississippi, in which our Supreme Court held that the Excise Tax imposed upon the sale of gasoline was due, even though it left the storage tanks of the oil company in drums, labeled and consigned to points beyond the state. The Court holding that the pertinent facts controlling the transaction were that the gasoline was actually bought and paid for by a purchaser residing within the state, and that the billing of same to a point beyond the state was a mere subterfuge and could not defeat actual facts with reference to the transaction being strictly local and subject to state control. The decision of the Supreme Court of Mississippi was affirmed by the Supreme Court of the United States in 280 U. S. 390. Our Supreme Court, in said opinion used the following language:

> "The transaction is to be determined by its facts and not by a fantastic, farfetched consideration."

The Court used the following language, which is directly applicable to this case and answers the contentions made by the appellant in the cases cited to this Court, most of same being mentioned and discussed in the opinion of our Court. The language referred to being as follows:

> "The cases relied upon by the appellant can all be differentiated from the case before us. It does not matter whether the intrastate business done was merely equal to the interstate business, the state's control over the intrastate business is full and complete, subject only to the provisions of the Federal Constitution. The powers of the state, not given to the United States government by the Federal Constitution, are reserved to the state or the people.

The state constitutes an essential unit in the federal scheme, and the state should not be embarrassed in the operation of its functions within its sphere, but should be left to discharge those functions according to its own conception thereof."

This case was likewise appealed to the Supreme Court of the United States and there affirmed. And the following language of the Supreme Court of the United States is peculiarly applicable to the question before this Court, said language being as follows:

"Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in Federal Compress Co. v. McLean; and the rule there declared must govern here. Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed by them may be subject to a property tax."

The attorneys for the appellant make frequent reference to the case of Freeman v. Hewitt, reported in 329 U. S. at page 249. But I fail to see the application of the question decided in that case to the question before the Court at bar. The Court had before it in said case only the question of authority of Indiana to tax a sale, which was admittedly an "interstate sale". Whereas, the case at bar does not involve a sale, but involves only a tax imposed upon a strictly local activity, that has no interstate aspects. The case only emphasizes the old established rule that a State may not tax or place any burden upon interstate commerce, and the only basis for the contention made on behalf of the appellant in this case is that at the time that the oil was delivered to the appellant for transportation from one point to another in the State, it was known that the oil would ultimately be moved out of the State by an interstate carrier. And some of the cases cited by the Court in said opinion hold that the mere fact that goods are manufactured within a State, or handled in any other way locally, are not regarded as in interstate commerce, even though such goods are manufactured for the purpose of shipment outside of the State.

This thought is emphasized by the following language used by the Court in said opinion:

> "As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. Thus, it can tax local manufacture even if the products are destined for other States. For some purposes, manufacture and the shipment of its products beyond a State may be looked upon as an integral transaction. But when accommodation must be made between state and national interests, manufacture within a State, though destined for

shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation. American Mfg. Co. v. St. Louis, 250 U. S. 459; Utah Power & L. Co. v. Pfost, 286 U. S. 165."

With further reference to the proper rule as applied to the taxability of local activities of the appellant, without reference to the ultimate destination of the commodity handled by it, I call the Court's attention to the case of Department of Treasury of Indiana v. Ingram-Richardson Manufacturing Company of Indiana, reported in 313 U. S. at page 352.

In this case a plant which had a patent upon an exclusive enameling process sent its representatives into adjoining states soliciting business of manufacturers of bath room fixtures, stoves, and other equipment that required enameling in its finished state. When the business was procured, the representatives of the company transported the material to be treated from without the state into the state of Indiana. And after the service was rendered in the enameling of the equipment, and preparing it for ultimate sale, it was then transported out of Indiana into adjoining states, and a charge made for the entire service rendered.

The manufacturing Company claimed that the whole transaction constituted interstate commerce, since the material treated was brought from without the state and when treated, was again transported out of the state in interstate commerce for sale in other states. But the Court held that the tax was based upon the value of the service rendered, which consisted chiefly of activities within the State of Indiana, and was therefore taxable

under the gross income tax law of Indiana, which is similar in all respects to our so-called Sales Tax Law.

The Court, in holding that the company performing the service was taxable upon the entire income, regardless of the fact that activity within the state was only part of the service rendered, and the transportation across the state lines was also involved, and the material treated was immediately delivered by the company to customers in other states, using the following significant language:

> "The enameling process was an activity performed at respondent's plant in Indiana and the gross receipts therefrom were taxable by Indiana under its Gross Income Tax Law."

Cited in support of said conclusion was a case of Department of Treasury of Indiana v. Wood Preserving Corporation, reported in 313 U. S. at page 62.

In said case the facts were that the company purchased cross ties from the local producers in Indiana and sold and delivered these ties to the Railroad Company in Ohio. The ties were inspected by a representative of the Railroad Company at the place of production and were accepted before being loaded on freight cars to be transported into Ohio.

The contention was made that because the cross ties were transported into Ohio from the place of purchase and delivered to the Railroad Company in Ohio after being treated with creosote, that so far as the sale and transportation were concerned, were in interstate commerce, but the Court held in answer to this contention that:

"These were local transactions, sales and deliveries of particular ties by the respondent to the Railroad Company in Indiana.

"The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for the treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana."

The Court cited in support of its last conclusions the case of Superior Oil Company v. Mississippi, 280 U. S. 390, which has been heretofore discussed in support of the contention that the sale of gasoline was held by our Court and affirmed by the Supreme Court, holding that the transaction was none the less a local activity even though the gasoline was purchased for and consigned to persons situated outside the State of Mississippi.

Another comparatively recent decision by the Supreme Court of the United States is applicable in principle, to the question before this Court. I refer to the case of Jersey Central Power & Light Company v. Federal Power Commission, reported in 319 U. S. at page 61.

Under the Federal Power Act of Congress of 1935, the Federal Power Commission was given authority to regu-

late the rates and charges of power companies transmitting power in interstate commerce.

Section 201 (a) of the Act provided that since the business of transmitting electric energy for ultimate distribution to the public affected the public interest, that the Federal Power Commission had the authority to regulate such matters where the transmission of electricity was in interstate commerce.

The Jersey Central Power & Light Company maintained a plant wholly within the state of New Jersey, but transmitted its power to a connecting line in New York. And it was contended by the Federal Power Commission that because the power was delivered to a connecting line and thence transmitted beyond the borders of the state of New Jersey, that the Power Commission had jurisdiction to fix the rates and charges.

The language of the Court applicable to the question before this Court, in distinguishing a strictly intrastate activity, from an interstate activity is covered by the following language of the Court:

> "Sub-section (c) defines the electric energy in commerce as that 'transmitted from a State and consumed at any point outside thereof.' There was no change in this definition in the various drafts of the bill. The definition was used to 'lend precision to the scope of the bill.' It is impossible for us to conclude that this definition means less than it says and *applies only to the energy at the instant it crosses the state line and so only to the facilities which cross the line and only to the company which owns the facilities which cross the line.*" (Emphasis Supplied).

The appellant filed as an exhibit to its declaration a copy of its tariff, which is typical of similar tariffs is-

sued in connection with its activities at various places within the state where it operated its gathering lines from the field of production to the place on some railroad within the state where the oil was delivered to a common carrier for transportation without the state.

Typical of the general provision is the tariff setting out the rate for gathering and transporting crude petroleum by pipe lines from the lease tankage within the territory of the Interstate Oil Pipe Line system in Eucatta Field, Wayne County, Mississippi, to the point of the Interstate Oil Pipe Line Company on the Gulf, Mobile & Ohio Railroad at Hiwannee, Wayne County, Mississippi. It will be noted that the rate in cents per barrel of forty-two gallons is Eight Cents. And this charge is no doubt the total charge for the transmission of the oil between said two points in Mississippi. But in addition to said rate, there is an additional provision titled "Loading Charge," which provides that

> "All crude petroleum required to be loaded into railroad tank cars or tank trucks at above destination will be subject to an additional charge of Two Cents per barrel."

The next tariff in the order of arrangements shows that the charge for transporting crude oil from the same place to the same destination in the state, which tariff was issued March 14, 1946, and succeeded tariff formerly referred to which was issued January 2, 1945, the charge of transportation on each barrel of oil over said distance was raised to Nine Cents. But the charge for loading the oil into tank cars or truck tanks after it reached its destination remained at Two Cents per barrel.

It will be noted that not only has the service rendered been separated into separate and distinct acts and the

charges were made for transportation of oil from oil field to the loading ramp varied according to the distance, but that in each instance where the oil was further handled by the company by loading same into tank cars or tank trucks, there was an additional charge of Two Cents per barrel for loading remained the same notwithstanding the fact that the charge for transporting the oil from the oil field where produced to the place in the state where same was to be delivered to the common carrier, varied from time to time.

For the purpose of demonstrating to the Court that the appellant not only regarded its several activities separately and made the charge accordingly for separate acts performed in connection with the oil transported within the state, charging one price for some transmissions from point to point within the state, and an additional charge for handling the oil whether by loading same after it had reached its destination within the state, but by a tariff published after it had established its trunk line, and which activity was continuous from the point of gathering through its own pipe line continuous without the state, even then the transportation charge was separate, so as to show separately and distinctly the value of the service rendered within the state and the service rendered after the state line was reached.

For instance, the tariff referred to shows that oil transported from Cranfield in Adams County to the point where same entered its trunk pipe line, the charge for gathering and transporting it to the two points within the state remained Four Cents per barrel, but the transportation rate after it reached the state line to its ultimate destination in East Baton Rouge Parish was charged separately as Seven Cents per barrel, making

the total transportation charge from the field in Mississippi where gathered to its ultimate destination without the state, Eleven Cents per barrel. But even then, the appellant regarded the transportation from the field to the point where it entered its own trunk line as a separate and distinct activity, the compensation for which was paid separately.

The Court will bear in mind that the department has been very liberal in its construction of the law, and has refrained from making any demand for any taxes upon the amount received by the appellant for any service rendered within the state, when appellant actually transported the oil beyond the limits of the state with its own facilities. This was the rule of the department even though the appellant itself regarded the gathering and transporting of the oil to a common carrier in the state as a separate activity and made a separate charge therefor.

I therefore feel justified in saying that in the construction of the exemption feature of the two laws relied upon by the appellant in claiming non-liability, have been very liberally construed in favor of the appellant, although it is the uniform rule laid down by all the Courts that exemption statutes should be strictly construed and that when any doubt arises as to whether or not an exemption is granted by any statute, the doubt must be resolved against the exemption.

For the purpose of making a simple, practical demonstration of the result of adopting the construction of the attorneys for the appellant, that the mere fact that before the oil is moved from the place of production, the appellant is notified as to the amount of oil to be moved, the consignee to which the oil is to be shipped, and the ulti-

mate destination of the oil, would make the activity of the plaintiff in transporting the oil from the place of production to the place within the state where the actual interstate movement begins, interstate commerce, I suggest that if this rule is correct, then, if I employ the services of a taxicab or other local conveyance, with instructions to go to my home and transport a member of my family and their baggage to a railroad station within the state, informing the driver of said taxicab that the person and baggage transported to the depot is for the purpose of making an interstate journey; and if I should also request the taxi driver to procure a reservation for the person to be transported on a train or pullman, then the service of the taxicab wholly within the confines of the state or city would be interstate transportation.

In the annotation to a case reported in 27 ALR, which annotation begins on page 1139 of said volume, the following language appears, which to my mind, fully demonstrates the incorrectness of the position taken by the appellant, using the identical illustration for the purpose of such demonstration. The language referred to is as follows:

> "In New York ex rel. Pennsylvania R. Co. v. Knight (1904) 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202, affirming (1902) 171 N. Y. 354, 98 Am. St. Rep. 610, 62 N. E. 152, it was held that a franchise tax imposed under New York statutes upon the Pennsylvania Railroad Company for carrying on a cab service wholly within the state, for the purpose of conveying its passengers to and from its ferry landing in New York City, the charges for which were entirely separate from those for other transportation, was not an unconstitutional burden on interstate

commerce, but a tax upon an independent local service, preliminary or subsequent to any interstate transportation. The Court said that it was true that a passenger over the railroad to New York City did not, in one sense, fully complete his journey when he reached the ferry landing on the New York side, but only when he was delivered at his temporary or permanent stopping place in the city; and that, looking at the matter from this standpoint, the cab service was simply one element in continuous interstate transportation, and as such would be excluded from state control; but that, *on the other hand, the cab service was exclusively rendered within the limits of the city, and was contracted and paid for independently of any contract or payment for strictly interstate transportation;* and that when service is wholly within a state it is presumably subject to state control, and that the burden is on one who asserts that though actually within, it is legally outside, the state; so that unless the interstate character was established, locality determined the question of jurisdiction. The Court further stated: 'Many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed? *We are of the opinion that the cab service is an independent local service, prelim-*

inary or subsequent to any interstate transportation'." (Emphasis supplied).

There are many other cases in the books using the identical or similar illustrations of the correct construction and differentiation between interstate and intrastate commerce. I find a case decided by the Supreme Court of the United States on June 23, 1947, and reported in Advance Sheet Number 16 of Volume 67 Sup. Ct. reported at page 1560, where the said court drew the same distinction, and used the same illustration which I have used in distinguishing between interstate and intrastate commerce, and where such interstate transportation actually begins.

The case referred to is that of the United States of America vs. Yellow Cab Company et al. The question before the Court was whether or not certain cab companies were violating the anti-trust laws by the contracts entered into with certain railroad companies by which they monopolized transportation of passengers to and from connecting railroads, or from their places of residence to railroad stations where they would embark on interstate journeys. The language of the court referred to, and which I deem to be applicable to the question before the court is as follows:

"The interstate commerce toward which this aspect of the conspiracy is directed is claimed to arise out of the following facts. Many persons are said to embark upon interstate journeys from their homes, offices, and hotels in Chicago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago. Conversely, in making journeys from other states to home offices and hotels in Chicago, many persons are said to complete such trips

by using taxicabs to transport themselves and their luggage from railroad stations in Chicago to said homes, offices and hotels. Such transportation of persons and their luggage is intermingled with the admittedly local operations of Chicago taxicabs. But it is that allegedly interstate part of the business upon which rests the validity of the complaint in this particular.

"We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, *admittedly cross no state lines;* by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the City.' None of them serves only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago. *They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares.* In short, their relationship to interstate transit is only casual and incidental.

"In a sense, of course, a traveler starts an interstate journey when he boards a conveyance near his home, office or hotel to travel to the railroad station, from which the journey is continued by train; and such journey ends when he alights from a conveyance near the home, office or hotel which constitutes his ultimate destination. Indeed, the terminal points of an interstate journey may be traced even further to the moment when the traveler leaves or enters his room or office and descends or ascends the building by elevator.

"But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. Swift & Co. v. United States, 196 U. S. 375; 398; North American Co. v. S. E. C., 327 U. S. 686, 705. And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.' United States v. Capital Transit Co., 325, U. S. 357, 363. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations.

"Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement." (Emphasis supplied).

As authority for the contention of the Commissioner that the preliminary movement of the oil from the place of production to another place within the state, where it is to be delivered to the carrier with facilities for transporting beyond the state, is not only an intrastate movement, but such movement as contemplated by the statute under consideration, I refer the Court to the case of Pennsylvania Railroad Co. v. Knight, decided by the Supreme Court of the United States on January 4, 1904, reported in 192 U. S. at page 21. This is a comprehensible rule directly applicable to the facts in this case, and has

never been overruled. The language of said decision directly applicable to this case being as follows:

"To hold the even balance between the Nation and the State in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life, and business conditions. Into many relations and transactions there enter elements of a national as well as those of a state character, and to determine in a given case which elements dominate and assign the relation or transaction to the control of the Nation or of the State, is often most perplexing. And this case fully illustrates the perplexities.

"It is true that a passenger over the Pennsylvania Railroad to the City of New York does not in one sense fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state and be subject to national control. The State may not tax for the privilege of doing an interstate commerce business. (Atlantic & Pacific Telegraph Company v. Philadelphia, 190 U. S. 160). *On the other hand the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.*"

"Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only

within the limits of New York, and yet that service is an interstate carriage. By reason thereof, the Nation regulates that carriage, including the part performed by the New York Company. *But it does not follow therefrom that the New York Company is wholly relieved from state regulation and state taxation,* for a part of its work is carriage and transportation begun and ended within the State. So the Pennsylvania Company, which is engaged largely in interstate transportation, is amenable to state regulation and state taxation as to any of its service, which is wholly performed within the State and not as a part of interstate transportation." (Emphasis supplied).

"It is true, it was said in the case of Daniel Ball, 10 Wall. 557, 565, 'whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the State has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. *The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey.* This is all preliminary work, performed for the purpose of putting the property in a state of preservation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely with-

in the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether in fieri, and not at all a fixed and certain thing' (Diamond Match Company v. Ontonagon, 188 U. S. 82; Detroit &c. Railway Company v. Interstate Commerce Commission, 21 C. C. A. 103; 43 U. S. App. 308; Interstate Commerce Commission v. Detroit &c. Railway Company, 167 U. S. 633.)" (Emphasis supplied).

Merely to illustrate to this Court that the rule announced in the case just quoted from has never been overruled or modified, I call the Court's attention to the fact that in a recent case, United States v. Yellow Cab Company, heretofore cited, which was decided on June 23, 1947, cited the foregoing case with approval in the following words:

"Pennsylvania R. Co. v. Knight, 192 U. S. 21, 24 S. Ct. 202, 48 L. Ed. 325, demonstrates this common understanding. The Court there held that the Pennsylvania Railroad Company was subject to a state franchise tax by reason of the fact that it maintained a cab service within the boundaries of New York City for the sole benefit of its rail passengers. Its cabs transported the passengers between its ferry station and their residences and hotels. The Court stated that this cab service was an independent local service, preliminary or subsequent to any interstate transportation and not included in the contract of railroad carriage. Hence it was subject to state taxation."

All of the foregoing was before the lower court in the form of a brief which was considered by the lower court

along with the authorities cited by the attorneys for the appellant. And although the attorneys had the benefit of the argument hereinbefore contained in the preparation of their principal brief in this case, I assert, with confidence, that they cited no cases in their brief which hold contrary to the authorities hereinbefore discussed in any case with similar facts. And I shall therefore make reply only to such cases as are cited by the attorneys for the appellant in their brief which I deem to have any bearing on the question before this Court.

Since Point B in the brief of the attorneys for the appellant deals only with the question of the right of the state to tax interstate commerce, I do not deem it necessary to dwell at length on this point in the brief of the attorneys for the appellant. And there is no effort on the part o fthe appellee to contend that any tax is imposed by the laws under consideration, if the appellant was actually engaged in interstate commerce as contemplated by said statute.

I shall therefore address the balance of this brief only to a discussion of the contention of the attorneys for the appellant, and make reference only to the cases which they cite in support of their contention that the activities of the appellant within the State of Mississippi which were the basis of the demand for the taxes paid, and sought to be recovered by this suit, in point A of this brief.

This Court will bear in mind that this appellant during the period in which activities were engaged in in the State of Mississippi on account of which the taxes in question were demanded and paid, consisted wholly of transportation of oil by pipe line from a point in the state to another point in the state, which is a description of

the business taxe by the Tax Statute under consideration. It will also be borne in mind by the Court that the appellant had no facilities for, did not in any sense transport any oil across the state line; and received no compensation other than that paid for the actual number of miles which oil was transported from the place of production in this state to its ultimate destination in this state so far as the activity of the appellant was concerned, and it admittedly had no contract to transport oil beyond the boundary of the state, had no facilities for transporting the oil outside of the state, and received no compensation except that measured by the price per barrel which it charged according to the number of miles within the state which the oil was transported.

I therefore respectfully submit that under these admitted facts the question before this Court is reduced to its simplest form, that is, as to whether or not the appellant engaged in such activity within the state as it was sought to tax by the statute of Mississippi imposing the tax collected. And all efforts on the part of the attorneys for the appellant to convert such limited activity within the state into an integral part of interstate commerce over which the state would have no control, in my judgment, have utterly failed.

One of the earliest cases cited by the attorneys for the appellant refers to the case of Daniel Ball, 10 Wall. 557. And by reference to said case it will be noted that the Court said:

> "Whenever a commodity had begun to move as an article of trade from one state to another, commerce on that commodity between the states had commenced, *but this movement does not begin until the articles have been shipped or started for transporta-*

tion from the one state to the other." (Emphasis supplied).

And it will be further noted in the same opinion that the carrying of said articles to the place where the journey out of the state begins is no part of the interstate movement.

Another case cited by the attorneys for the appellant is West Virginia Pipe Line Co. v. State, 120 Southeastern 759. This case was cited only for the purpose of establishing the rule that transportation of oil by pipe line is commerce, about which there is no disagreement.

Other cases cited by the counsel for the appellant are the cases of Federal Compress and Warehouse Co. v. E. R. McLean, Sheriff, 291 U. S. 17, and Chassaniol v. City of Greenwood, 291 U. S. 584, both being the Mississippi cases heretofore discussed at length in this brief, and I shall therefore not dwell upon said cases.

While the attorneys for the appellant in their printed brief show in the index under the head "Table of Cases," eighty-eight cases, a review of all of said cases will show that they fall into three separate and distinct classes. And without burdening the Court by attempting a detailed analysis of each case, I can assure the Court that many of them deal only with the right of the state to tax interstate commerce, which question is not in dispute, and many of the cases deal only with the question of the status of property for advalorem purposes at certain stages of a movement which is ultimately to be interstate. And the cases in the last class, I confidently assert have no bearing on the liability of the appellant for an excise tax which is applied to the activity of the appellant within the state in the manner of handling property, whereas

the advalorem cases are decided on an entirely different basis and under different principles of law.

Many of the cases listed in the index of the printed brief for the appellant, while not discussed in detail, will be found to deal with many subjects, including the regulation of Interstate Commerce by states, which has no bearing on the question before the Court, and some of the cases deal with other subjects not pertinent to the issue presented to the Court in this case. And while I have scanned through the entire list of cases shown in the index, and have determined the class in which each case falls, I shall not consume the time of the Court in discussing the cases cited and not discussed in the brief of the appellant.

The case of the Railroad Commission v. Worthington, 225 US, 101 deals only with the right of the State to fix rates covering the within state movement of commodities actually in continuous movement in interstate commerce.

The case of Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 US, 498 only holds that when goods are actually started in the coure of interstate transportation to another state, they are regarded as in interstate commerce.

The next case in order, Texas and New Orleans Railroad Co. v. Sabine Tram Company, 227 US, 111 merely holds that the question of the right to fix rates depends on whether or not the shipment has actually begun movement for export in determining what authority may fix the rate.

I shall not burden the Court by taking up each separate case in detail where same were not commented upon by the attorneys for the appellant, but I merely mention

these cases from time to time as indicative of the fact that many cases are cited which have no bearing upon the exact question before the Court. As for instance, the case of Eureka Pipe Line Company v. Hallanan, 257 US, 265 dealt only with the question with reference to the tax measured by the quantities produced where interstate and intrastate movements were commingled in movement out of the state, and the case of Hughes Brothers Timber Company v. Minnesota, 272 US, 469 deals only with the question of whether or not logs which have started in interstate movement are subject to advalorem taxes.

The next case cited by the attorneys for the appellant is the case of Richfield Oil Corporation v. State Board of Equalization, said citation being to 163 Pac. (2d), page 3, but this same case was appealed to the Supreme Court of the United States and is reported in 91st Law Ed., page 123. And I therefore suggest to the Court that the following language taken from the opinion of the Supreme Court of the United States plainly distinguishes this case from the case at bar.

The Court will bear in mind that the question under consideration by the Court is whether or not the tax imposed upon the sale of the commodity, under the California Sales Tax Law and the question was raised as to whether or not the imposition of the tax would be in violation of the constitutional inhibition against states imposing tax on imports or exports:

> "When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or,

at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards."

The language just quoted shows that said case had no application to the case before this Court because the tax in question was not imposed on the owner of the oil, nor does it have any application to the amount of oil sold nor the ultimate destination of the oil in question, the sole imposition being for a purely local activity of the appellant herein which was engaged solely in transportation of commodities for hire between the two points within the state.

The quotation from the opinion in the brief for the appellant plainly show that even in this case that in order to come within the prohibition of the imposition of the tax, the common carrier to whom the commodity is first delivered must be one "whose sole purpose is to transport goods to an out of state destination." The other language quoted in the brief of the appellant "The beginning of the transit which constitutes interstate commerce is the point of time when an article is *started on its ultimate passage.*"

Another recent case cited by the attorneys for the appellant is the case of Interstate Natural Gas Company, Inc. v. Federal Power Commission, 91 L Ed. page 1555. Said case likewise dealing only with the right of the Federal Power Commission to regulate the rate to be charged for gas admittedly sold in interstate commerce, and the

following language from the opinion of the Court served to definitely distinguish the question decided in that case from the question presented to the Court in this case, where only the activity of the appellant consisted of transporting the oil between points within this state for the purpose of making delivery to an interstate carrier who alone contracted to move the oil from this state to another state:

> "Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach."

The attorneys for the appellant next invoked certain decisions of the Supreme Court of the United States in what is known as the Stevedoring cases. And I respectfully submit that said cases have no application whatsoever to the question presented in the case before the Court for the reason that the stevedoring cases have to do with maritime shipping, which has been distinguished by the Courts due to the peculiar nature of such shipping, and the necessity for loading ships by experts for the protection not only of the cargoes, but the ships themselves.

It seems that from the early days, commerce carried on by shipping on navigable waters was held to be under the exclusive jurisdiction of the Maritime Department, and that Congress had put a different construction on the rules with reference to commerce, and that maritime service was subject to different construction for the reasons set out in the various cases.

One of the early cases in which this rule was first announced was that of Atlantic Transport Company vs. Imbrovek, reported in 234 U. S. at page 52.

This case involved a suit by a person injured in the loading of a ship. And the question presented to the Court was whether or not the same rule of liability would apply to injuries received in this class of work, and what court would have jurisdiction to hear the matter. In the decision of this question the Court used the following language:

> "The libelant was injured on a ship lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly, the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as the mariners'."
>
> "If more is required than the locality of the wrong in order to give the court jurisdiction, the relation

of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient. Even with respect to contracts where subject matter is the exclusive test, it has been said that the true criterion is "whether it was a maritime contract, having reference to maritime service or maritime transactions'."

The next case in order which bears on this same question is that of International Stevedoring Company vs. Haverty, reported in 272 U. S. at Page 50.

In this case the action was brought in a state court, seeking a common law remedy for personal injuries sustained by the plaintiff on a vessel at dock in the harbor at Seattle, Washington. The plaintiff was a longshoreman engaged in storing freight in the hold of a vessel and claimed that through the negligence of the hatchtender that the freight was lowered into the hold and injured the plaintiff badly.

The plaintiff argued that the case was governed by the Admiralty law; and that the Admiralty law had taken up the common law doctrine as to fellow servants. The Court in passing on this question used the following language:

"It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of

> the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of the opinion that a wider scope should be given to the words of the act, and that in this statute 'seamen' is to be taken to include stevedores employed in the maritime work on navigable waters as the plaintiff was, whatever it might mean in laws of a different kind."

These cases were cited and discussed in the leading case, to-wit: Puget Sound Stevedoring Company vs. State Tax Commission, reported in 302 U. S. at page 90. And the Puget Sound case is the one relied upon by the Court in its decision in the case of Joseph vs. Carter and Weeks Stevedore Company, cited by the attorneys for the plaintiff in this case. And while the case involved the right of the State of Washington to impose the tax on the business of engaging in any business activities within the state, the question was raised, and decided by the Court that since the business of stevedoring, for the reasons hereinbefore set out, constituted a part of interstate commerce, then the Court held that the tax was not applicable to said business, and the following language of the Court in said case explains the basis of said holding and the reasons therefor, as heretofore indicated by the cases quoted from. The language of the court and explanation of its holding being as follows:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at a destination. A

stevedore who in person or by servants does work so indispensable is as much an agency of commerce as ship-owner or master. 'Formerly the work was done by the ship's crew; but owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class as clearly identified with maritime affairs as are the mariners.' Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 62. No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading an interstate or foreign vessel. Cf. Baltimore & O. S. W. R. Co. v. Burtch, 263 U. S. 540. The longshoremen busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a 'seaman.' International Stevedoring Co. v. Haverty, 272 U. S. 50. A stipulation in the record tells us that any serious interruption in the service of such cargo handlers cripples at once the activities of a port and slows down and obstructs the free and steady flow of commerce. We might take judicial notice of the fact if the stipulation were not here."

In the case of Joseph vs. Carter and Weeks Stevedoring Company, the court while following the Puget Sound Stevedoring Company case, used the following language which is significant in support of the distinction which it is sought to draw in this discussion. And after reviewing the case of American Manufacturing Co. vs. St. Louis and the Berwin-White case, which has heretofore been discussed in the briefs of the appellant, the court used the following language:

"Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions.

"Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden or multiple levies, these laws may be unconstitutional because they burden or interfere with commerce. See Southern P. Co. v. Arizona, 325 U. S. 761, 767, 89 L. Ed. 1915, 1823, 65 S. Ct. 1515. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a State with the freedom on interstate commerce.' Freeman v. Hewit, supra (-US-, ante 210, 67 S. Ct. 274)."

While I have apparently allowed myself to be "led far afield," in that I have discussed many cases cited by the attorneys for the appellant, that in my opinion have no bearing on the case presented by this record, I have done so only in aid of the Court in distinguishing such cases from the case at bar. And I therefore shall confine my further discussion to the simple question involved in this case.

There is no denial by the appellant that the only taxes demanded and paid by it were computed upon amounts received as compensation for services performed wholly within the state. And that it not only did not contract to transport oil beyond the borders of the state, but at the time the service was performed had no facilities, nor contractural relation with any carrier equipped to transport the oil beyond the borders of the state.

When these facts are considered in connection with the statute under which the Sales Tax was collected, Section 10109 of the Code of 1942, it is apparent that the question of whether or not the activities performed within this state by the appellant might ultimately be considered as connected with interstate commerce, for some purposes, such a conclusion would have no application to the provisions of the statute, which provides:

> "Upon every person engaging or continuing within this State in the business of operating a pipe line for transporting from one point to another in this State oil or natural gas or artificial gas through pipes or conduits in this State, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business."

It will be noted that the statute quoted definitely imposes a tax upon any person operating a pipe line for transporting from one point to another in the State oil or natural gas, or artificial gas through pipes or conduits in this State. Which provision is identical with the provisions of the other six paragraphs in said section, imposing taxes on public service corporations performing services within the State. And no question would be raised by this, if it were not for the proviso contained in

the last paragraph of said section, which allows a deduction from the gross income of any such businesses of the amounts received if a business is also conducted in commerce between this State and other States of the United States, or between this State and foreign countries. And in explanation of the meaning of said proviso, the statute further provides "which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

It is manifest that the statute is intended only to impose taxes on local activities, and in the application of said statute to the several forms of business taxed by the same section, telegraph companies, which are engaged in both interstate and intrastate business, pay the tax on all messages transported between points within the State. Telephone companies, although engaged in both interstate and intrastate pay this tax on all messages transported from one point in the State to another point within the State. Railroad companies transport freight and passengers, both interstate and intrastate, pay the tax on all freight and passengers transported from one point within the State to other points within the State. Sleeping car companies, though engaged in both interstate and intrastate business, pay the tax on all fares received from passengers transported from one point within the State to other points within the State. Express companies, which do both interstate and intrastate business, pay the tax on all amounts received for transporting merchandise from one point within the State to other points within the State. Bus companies, although doing both interstate and intrastate business, pay the tax on all fares received for transportation of passengers or freight from one point in the State to other points within the State.

In view of this uniform acceptation of the meaning of the statute for all other public service companies which actually do an interstate business as well as an intrastate business, I can see no reason why a concern which had no facilities for, and engaged in no other business whatever than the transportation of oil as a common carrier between one point in the State to another point within the State should claim immunity from the tax merely on the theory that the oil transported by them ultimately was carried beyond the State line by an interstate carrier, with which the appellant had no contractual relation nor received any compensation for any part of the movement of the oil for its actual transportation from a point within the State to a point beyond the State.

A great deal has been said in the brief of the attorneys for the appellant as to the language "which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America," but I insist that this provision is merely explanatory of the fact that the legislature did not seek to impose a tax other than for strictly local activity, and emphasized this fact by writing in this additional explanation of the purpose of the statute.

Not conceding that the activity of this appellant is any part of interstate commerce, but for the sake of argument, I suggest that even though for some purposes it might be considered as a link in interstate movement, even then, according to the language of the Mississippi Court as used in the case of Stone v. General Electric Contracts Corporation, 193 Miss. 317, the State would not be prohibited in collecting the kind of tax imposed on strictly local activities, as indicated by the following language of the Court in said case:

"It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it has no substantial effect to block or impede the freeflow of such commerce."

This language of the Mississippi Court was used as expressing the adoption by said Court of the principle laid down in the case of Stone v. Interstate Natural Gas Company, reported in 103 Federal 2d at page 544, and affirmed by the Supreme Court of the United States in 308 U. S., 522. The language of the Court in said last mentioned decision which was adopted and subscribed to by this Court being as follows:

"A basic principle is that taxation is vital both to the State and national governments; to be concurrently exercised by both with as little interference as possible by one with the other. Another basic principle is that immunity from taxation ought to be jealously regarded. It is well settled that a total or partial exemption claimed under a private charter or other legislative contract cannot rest on implication, but only on express words which are free from reasonable doubt. An implication of immunity based on constitutional provisions ought to be a necessary implication, and to extend no further than the necessity requires; and this especially when the immunity is invoked not in behalf of the government but of a citizen or private corporation. It is clear also that

because a matter is regulable only by one government it is not thereby exempted from just taxation by the other. No one supposes that because intrastate commerce and most other businesses are regulable by the State that the national government may not properly tax them and those engaged in them. Federal taxes were from the beginning placed on liquors and tobacco and the production and the local handling of them. Conversely, the clause of the Federal Constitution vesting exclusive power to regulate interstate and foreign commerce in Congress ought not of itself to exempt such commerce and those who carry it on in a State from a decent and non-discriminatory State taxation. Impairment of the commerce power of Congress really arises only if the State by intention or in actual effect regulates commerce by license or other special taxation, or burdens it unduly so as to impede it; or if the State law imposing the tax conflicts with some regulation made by the Congress in its supreme right."

CONCLUSION

In conclusion, I respectfully submit, that the activity engaged in by the appellant, for which it received compensation upon which the tax in question was computed and paid, consisted wholly and only of transporting oil . . . "from one point to another in this state . . . through pipes or conduits *in this state*," which is the exact business upon which the tax was imposed and paid.

The appellant contends, however, that it should not have been required to pay the tax, because a general provision of the statute authorizes an exception from the gross income of the several activities taxed by said section, where both interstate and intrastate business is engaged in, such as railroads, telegraph and telephone, express, bus lines and any other such businesses known to be engaged in both interstate and intrastate commerce,

> "so much thereof as is derived from business conducted in commerce between this state and other states of the United States and foreign countries."

There is a qualifying proviso even to this provision, which must be

> "which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

The next thing that I would bring to the attention of the Court is that there is no contention by the appellant that it in any sense transported oil beyond the State line and was not the agent of the interstate carrier to which it delivered the oil, but on the other hand, was the instrumentality through which the owner of the oil entered into a contract with an interstate carrier by which the oil was

to be transported from points within this state to points beyond this state.

The Mississippi Court having had an opportunity to consider all the authorities cited in the brief of the appellant, as well as those cited in this brief, and having concluded that the taxes were due and properly paid, then I adopt literally the language of the Supreme Court of Mississippi as the same appears in the printed record in this Court, beginning with the third paragraph on page 48 of the printed record and continuing through and including page 58 of the printed record. And since the reasoning set out in said opinion is so logical and cogent, I do not deem it necessary to do other than call this Court's attention to the language of the Supreme Court of Mississippi, as contained in said opinion as the best argument that can be used in support of the opinion of the Mississippi Court.

I therefore respectfully submit that the decision of the Supreme Court of Mississippi was eminently correct, and that the decision of said Court should be affirmed by this Court.

Respectfully Submitted:

J. K. Sumrall

Attorney for the Appellee

CERTIFICATE

I hereby certify that I have this day mailed postpaid to the attorneys of record for the appellant a true copy of the foregoing brief, this 23rd day of December, 1948.

Attorney for the Appellee

Petition of the Appellant for a Rehearing

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No. 287

In the Supreme Court of the United States

October Term, 1948.

INTERSTATE OIL PIPE LINE COMPANY,
Petitioner (Appellant),

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION.

PETITION OF THE APPELLANT FOR A REHEARING.

VILLARD MARTIN,
JOSEPH L. SEGER,
PHELAN H. HUNTER,
FRANK R. CLARK, JR.,
GARRETT LOGAN,
JAMES A. ALEXANDER,
Attorneys for Appellant.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. 287

INTERSTATE OIL PIPE LINE COMPANY,

Petitioner (Appellant),

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION.

PETITION FOR REHEARING.

Comes now the above named Interstate Oil Pipe Line Company, and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

1. The Court erred in affirming the judgment of the Mississippi Supreme Court on the ground that the State of Mississippi had the power to levy on interstate commerce the tax in question when the State of Mississippi has legislatively, administratively and judicially determined that interstate commerce is exempt from the tax, which construction is binding upon this Court. A determination that Mississippi has the *power* to impose such a tax on interstate commerce does not decide this case unless the power has been exercised and the record clearly shows that Mississippi has not sought to apply the tax to interstate commerce, but has specifically exempted such commerce from its application.

The statute involved contains the following provision:

"There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from the business conducted in commerce between this state and other states of the United States, or between this state and foreign countries which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

—Mississippi Code 1942, Ann., Title 40, c. 3, par. 10109.

Appellee admits in his brief to this Court in this case that he has construed the exemption clause set out hereinabove to apply to all interstate commerce whether or not the State of Mississippi was prohibited from taxing it under the Constitution of the United States. His brief states at page 46:

"A great deal has been said in the brief of the attorneys for the appellant as to the language 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America,' but I insist that this provision is merely explanatory of the fact that the legislature did not seek to impose a tax other than for a strictly local activity, and emphasized this fact by writing in this additional explanation of the purpose of the statute."

If this statement should leave in the minds of the Court any doubts as to the administrative construction placed on this statute by those charged with its enforcement they should be fully dispelled by the following statement quoted from page 32 of appellee's brief to this Court:

"Since Point B in the brief of the attorney for the appellant deals only with the question of the right of the state to tax interstate commerce, I do not deem

it necessary to dwell at length on this point in the brief of the attorneys for the appellant and *there is no effort on the part of the appellee to contend that any tax is imposed by the laws under consideration, if the appellant was actually engaged in interstate commerce as contemplated by such statute.*" (Emphasis supplied.)

This unequivocal and long-established administrative construction of the Mississippi statute by those charged with its enforcement is supported by the construction placed on the statute by the Mississippi Supreme Court in the instant case when it states:

> "* * * by thus excepting from the gross income used in determining the measure of the tax so much thereof as is derived from business conducted in commerce between this and other states 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America' it was made known that it was not the purpose of the legislature to attempt to burden interstate commerce as such by the levy of a tax measured by a per cent of the gross income derived therefrom."
>
> —35 So. (2d) 77; Tr. 49.

The Mississipi Supreme Court, commenting further on the clause of its statute exempting interstate commerce, refers to shipments from producing leases to out-of-state destinations by interstate trunk pipe lines on a continuous journey or by railroad from local shipping points within the state, 35 So. (2d) 77, Tr. 50, and says:

> "If by the former method, it would of course constitute that character of commerce 'which the State of Mississippi is prohibited from taxing under the Constitution of the United States' and this would be equally true as to the movement by rail of oil from a local shipping point to its destination outside the State in cross-

ing the state line. Hence, the statute was designed only for the purpose of taxing the privilege of operating a pipe line for transporting the oil from one point to another in the state where it is then delivered to an interstate carrier *prior to beginning of its ultimate passage to a foreign state in interstate commerce.*" (Emphasis supplied.)

As pointed out in the opinion of Mr. Justice RUTLEDGE:

> "The State Supreme Court held that the operation of these pipe lines between points within the state was intrastate rather than interstate commerce, and that the tax was therefore 'merely on the privilege of operating a pipe line wholly within this state as a local activity. * * * a tax on the privilege of doing an intrastate business, and measured by a per cent of gross income as a matter of convenience'."

The rule that the construction of a state statute by the highest court of that state is binding on this Court is expressly affirmed in the opinions of both the majority and the dissenting justices of this Court in the decision of this case. However it is just as firmly established that the determination of what is and what is not interstate commerce is strictly a federal question which this Court should decide independently of the decision of the state court since the construction of the Constitution of the United States is the exclusive prerogative of the federal courts. *Southern Gas Corp.* v. *Alabama,* 301 U. S. 154; *Hooven and Allison Co.* v. *Evatt,* 324 U. S. 652, 658; *Caldarola* v. *Eckert,* 332 U. S. 155, 158; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483.

In the opinion of Mr. Justice RUTLEDGE, joined by Mr Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY, it is stated:

> "We do not pause to consider whether the busi-

ness of operating the intrastate pipe lines is interstate commerce for, even if we assume that it is, Mississippi has the power to impose the tax involved in this case."

The exemption of interstate commerce from tax in the Mississippi statute as construed by its administrative officials and its courts clearly distinguishes this case from *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217, and *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, on which Mr. Justice RUTLEDGE and the three other justices who join him rely, as well as from *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, for in all of those cases the state was attempting to apply the tax to activities admittedly in interstate commerce, while here the State of Mississippi has seen fit to exempt interstate commerce and has assessed the tax under the mistaken view that the activities here concerned are intrastate commerce. The opinion of Mr. Justice RUTLEDGE, *et al.*, would force the State of Mississippi to collect the tax on interstate commerce which it has expressly exempted and has never sought to tax. It therefore becomes necessary for this Court to determine whether the activities of appellant herein were interstate or intrastate commerce, a strictly federal question, and since the four justices who joined in the dissenting opinion of Mr. Justice REED agree that they were interstate commerce and the four justices whose opinion is set out by Mr. Justice RUTLEDGE have not expressed themselves on this point it is entirely possible and even probable that some or all of the latter group, if rehearing were granted, would construe these activities as interstate commerce. If even one of this group should so hold the judgment of the Mississippi court should be and would be reversed and the case remanded for judgment in favor of appellant.

This point was not fully covered in the appellant's brief but was discussed in oral argument of the case before the Court on January 13, 1949. Inasmuch as only eight members of the Court were present at the oral argument, while all nine members have joined in the decision of this case it is respectfully submitted that in view of the importance of the issue involved and the narrow margin of the decision it should be reconsidered and the case be assigned for rehearing and reargument before the entire bench.

2. As regards the power of the State of Mississippi to impose a privilege tax on the business of engaging in interstate transportation, the judgment of the Court in this case affirms the judgment of the Mississippi Supreme Court without majority concurrence on the reasons for the judgment. The opinion of four justices as expressed by Mr. Justice RUTLEDGE would repudiate the rule laid down by a majority of the present Court in *Joseph, et al., v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, which expressly approved and reaffirmed the decision of the Court in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, to the effect that a state or local tax on the privilege of engaging in interstate commerce measured by gross receipts therefrom is void as repugnant to the Commerce Clause of the Constitution of the United States, even though the tax does not discriminate as between interstate and intrastate commerce and even though the activities subjected to tax are entirely within the district imposing the tax. If these cases are not to be followed we respectfully submit that appellants and the Bar are entitled to a clear statement as to the reasons therefor. They should be either distinguished from the case at bar or expressly overruled and if overruled it should be by concurrence of a majority of the Court, so that all may be advised as to the law on this important matter.

3. The concurring opinion of Mr. Justice BURTON holding the Mississippi tax in question valid on the grounds that the appellant's activities were intrastate rather than interstate commerce raises serious questions as to whether said activities are properly subject to federal regulation under such statutes as the Interstate Commerce Act. In the absence of explanation as to the reasoning which led to this conclusion appellant is at a loss to know how it should determine in similar situations in the future what is and what is not interstate commerce in Mr. Justice BURTON's judgment without bringing to this Court each separate factual situation that may arise, which would be a costly procedure for appellant and would unnecessarily tax the time of this and the lower courts by multiplying litigation. The principles governing the determination of interstate transportation as distinguished from intrastate transportation have been well established by this Court in decisions in similar situations to that involved herein including the recent cases of *Joseph* v. *Carter & Weekes*, 330 U. S. 422; *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69; and *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, decided by the present Court, in all of which decisions Mr. Justice BURTON concurred. If the facts of this case distinguish it from the cases referred to or if the principles laid down therein are no longer controlling appellant is entitled to a delineation which may serve as a guide in determining whether similar operations in the future are interstate or intrastate commerce. Furthermore it is entitled to know whether a majority of the Court share Mr. Justice BURTON's views on this important question.

Conclusion.

Appellant finds after careful study of the opinion rendered in this case that a majority of the Court apparently agrees with all of the legal propositions on which its appeal was based, as follows:

(1) At least eight justices expressly and probably all nine agree that the construction of the Mississippi statute by the Supreme Court of that state (which exempts interstate commerce from the tax) is binding upon this Court.

(2) At least four justices expressly and perhaps as many as eight justices agree that appellant's activities in question were interstate commerce rather than intrastate commerce.

(3) Five justices agree that Mississippi does not have the power to impose on the privilege of engaging in the business of interstate transportation a tax measured by a percentage of gross receipts as attempted here.

The importance of the issues involved in this case, the wide divergence of views as to the reason for the decision, the close margin by which the case was decided and the further fact that one of the justices voting to affirm the judgment of the Mississippi court was not present at the oral argument of the case are believed to justify a reconsideration of the judgment.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judg-

ment of the Mississippi Supreme Court be, upon further consideration, reversed.

Respectfully submitted,

VILLARD MARTIN,
JOSEPH L. SEGER,
PHELAN H. HUNTER,
FRANK R. CLARK, JR.,
GARRETT LOGAN,
JAMES A. ALEXANDER,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL.

I, ..., counsel for the above-named Interstate Oil Pipe Line Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

.....,
Counsel for Interstate Oil Pipe Line Company.

A copy of the above and foregoing petition for appellant has been mailed, postpaid, to J. H. Sumrall, attorney for A. H. Stone, Chairman State Tax Commission, appellee, this 27th day of June, 1949.

.....,
Of Counsel for Appellant.